



## WISCONSIN LEGISLATURE

P.O. BOX 8952 • MADISON, WI 53708

August 29, 2005

U.S. Fish & Wildlife Service  
Upper Mississippi River National Wildlife and Fish Refuge  
CCP Comment: Don Hultman, Manager  
51 East 4th Street  
Room 101  
Winona, MN 55987

Dear Mr. Hultman:

Please accept these documents as our public comments on the Comprehensive Conservation Plan for the Upper Mississippi National Fish and Wildlife Refuge. We are also state-lawmakers who represent Wisconsin portions of the refuge and, because federal enabling legislation required consent by state law before acquiring this land, we believe it is essential that we continue to be involved through the planning process.

We are opposed to Alternative D, which was initially offered as the preferred plan, because it usurps state authority on sovereign waters and unnecessarily eliminates treasured wildlife and non-wildlife based recreational opportunities and economic activity.

In 1925 our legislature consented to creation of the refuge under the conditions that we maintained the ability to preserve navigation in all waters and that the right to regulate fish and game would be a matter of state sovereignty. Additionally, we hold the right of the public to hunt and fish as a part of the right of navigation. We view new restrictions on the use of motors, areas closed to navigation, and new regulations as contrary to the agreement in our statutes and in federal law.

In our August 24, 2005 Legislative Council Memo, which is attached, we discuss these issues in detail. Again, we do not believe that the State of Wisconsin has the legal authority to abrogate our legal trust in the state's waters.

Clearly, the legal title to fish is Wisconsin's and, considering that our DNR is developing its own tournament fishing regulations, new federal regulations would be redundant and possibly illegal.

Our offices have heard from thousands of our constituents. Nearly every single comment has been opposed to Alternative D and supportive of maintaining the current wildlife and non-wildlife related recreational opportunities.

Received 9/1/05

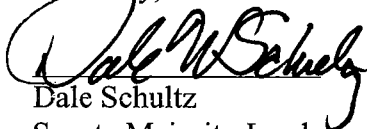
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In order for your agency to be good neighbors and to preserve public support for having this refuge in our back yard, join us in advocating for maximum recreational opportunities and continuing to manage the river as a multi-purpose resource. That is not at odds with the goals of the refuge because we do not believe new restrictions will conserve fish and wildlife. From the life's work of Wisconsin's own Aldo Leopold, we know that healthy fish and wildlife habitat is the key to having good fish and wildlife populations and that is where the service should focus its efforts. We strongly believe that increasing refuge closed areas will do nothing to improve fish and wildlife populations over all. Likewise, hunter spacing, shell possession limits, and managed hunts are ultimately not wildlife conservation tools, just ways to manage people.

People who spend time on the river understand that the river has many friends. We co-exist with commercial and industrial uses and cooperate with other recreational users. Article 9 of Wisconsin's Constitution requires it. The effect of recreational activities is inconsequential compared to the combined forces of everything that happens on the land throughout the Mississippi River Valley. The good that comes from having so many people who love the river outweighs any benefit that could conceivably come from alienating them as your preferred alternative does. If you take away our connection to the land, you will lose public support for having federally owned land in our area.

Again, we oppose Alternative D and any plan which restricts access to recreational activities and navigation because they usurp state authority on sovereign water and unnecessarily eliminate recreational opportunities and economic activity. We support the current level of public use of this spectacular resource. Thank you for the work that you and your staff will be doing to make sure our outdoor recreation heritage is preserved on waters of the mighty Mississippi.

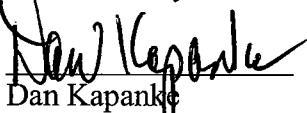
Sincerely,



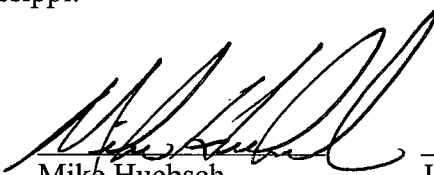
Dale Schultz  
Senate Majority Leader  
17<sup>th</sup> Senate District



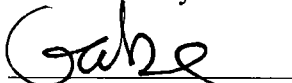
Barbara Gronemus  
State Representative  
91<sup>st</sup> Assembly District



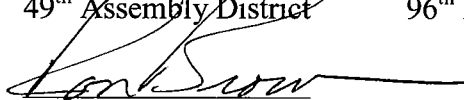
Dan Kapanke  
State Senator  
32<sup>nd</sup> Senate District



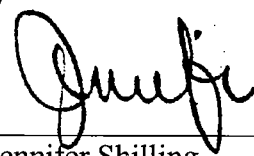
Mike Huebsch  
Majority Leader  
94<sup>th</sup> Assembly District



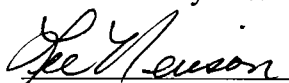
Gabe Loeffelholz  
State Representative  
49<sup>th</sup> Assembly District



Ron Brown  
State Senator  
31<sup>st</sup> Senate District



Jennifer Shilling  
State Representative  
95<sup>th</sup> Assembly District



Lee Nerison  
State Representative  
96<sup>th</sup> Assembly District

*Page 3, August 29, 2005*  
*Don Hultman, Manager*

Copies to: President George W. Bush, Vice President Richard Cheney, Senator Russel Feingold, Senator Herb Kohl, Representative Ron Kind, USF&WS Regional Director Robyn Thorson

Enclosure: August 24, 2005 Wisconsin Legislative Council Memo



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## WISCONSIN LEGISLATIVE COUNCIL

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*Terry C. Anderson, Director*  
*Laura D. Rose, Deputy Director*

TO: SENATORS RONALD BROWN, DAN KAPANKE, AND DALE SCHULTZ, AND  
REPRESENTATIVES BARBARA GRONEMUS, MICHAEL HUEBSCH, GABE  
LOEFFELHOLZ, LEE NERISON, AND JENNIFER SHILLING

FROM: Mark C. Patronskey, Senior Staff Attorney

RE: Wisconsin Sovereignty and Jurisdiction Over Waters of the Upper Mississippi River  
National Wildlife and Fish Refuge

DATE: August 24, 2005

You have asked me to prepare a memorandum that provides background information and an analysis of the issue of Wisconsin sovereignty and jurisdiction over waters of the Mississippi River which are also part of the Upper Mississippi River National Wildlife and Fish Refuge. This issue is of current concern because the U.S. Fish and Wildlife Service, which manages the refuge, is in the process of planning regulatory policy for the refuge that will apply for the next 15-year period.

This memorandum addresses that part of the Comprehensive Conservation Plan for the refuge, dated May 2005, that sets forth proposed regulations in Alternative D. Alternative D is the alternative that was originally selected as the preferred alternative by the U.S. Fish and Wildlife Service. In particular, this alternative calls for banning the use of motorized watercraft in certain areas of the refuge from October 1 to the end of the regular state duck season.

There is not an express prohibition in federal law that precludes the U.S. Fish and Wildlife Service from banning the use of motorized watercraft within the refuge. However, there are a number of provisions in federal and state law that raise fundamental questions about the authority of the U.S. Fish and Wildlife Service to adopt and enforce regulations that prohibit motorized watercraft in portions of the Mississippi River, and its sloughs and tributaries.

Although it is difficult to answer this question definitively, the issues discussed in this memorandum would provide a substantial basis for a legal challenge to the regulations, if the regulations were to be implemented. It should be noted that the issues discussed in this memorandum are all legal issues. Unlike the factual issues, and decisions within the discretionary authority of the agency, legal issues are addressed and resolved by the court without deference to the decisions of the agency.

**Acceptance of the Upper Mississippi River Fish and Wildlife Refuge With State-Imposed Conditions**

The federal enabling legislation for the refuge requires the U.S. government to obtain the consent of the states before purchasing land for the refuge. The refuge was authorized by Congress in the Upper Mississippi River Wildlife and Fish Refuge Act (June 7, 1924); 68<sup>th</sup> Congress, ch. 346; 16 U.S.C. ss. 721 to 731. The Refuge Act expressly required the U.S. government to obtain the consent by law of Wisconsin before acquiring land for the refuge. [16 U.S.C. s. 724.]

Wisconsin did consent to establishment of the refuge in s. 1.035, Stats., which was adopted by Laws of 1925, Ch. 170, and took effect on May 23, 1925. The plain meaning of the federal enabling legislation is that if the consent of the states is required, the states may either withhold or condition that consent. The statute includes a number of conditions on the state's approval of the refuge, including the following:

- Any conditions or reservations imposed by Illinois, Iowa, and Minnesota are also adopted by Wisconsin.
- Acquisition of land by the U.S. government must be approved by the Governor on advice of the Department of Natural Resources.
- Wisconsin retains legal title to fish for the purpose of regulating the use and conservation of the fish.
- The state retains jurisdiction over civil and criminal process.

For the purposes of the legislator's request for information, one of the conditions in s. 1.035 (2), Stats., is most significant. This provides as follows:

1.035 (2) The consent hereby given is upon the condition that ... the navigable waters leading into the Mississippi and the carrying places between the same, and the navigable lakes, sloughs and ponds within or adjoining such areas, shall remain common highways for navigation and portaging, and the use thereof, as well to the inhabitants of this state as to the citizens of the United States, shall not be denied.

These conditions have apparently been accepted by the U.S. government in establishment of the refuge. This statutory restriction, which mirrors the Wisconsin Constitution (art. IX, s. 1, discussed later in this memorandum) states, as clearly as possible, that restrictions may not be imposed on navigation in any of the navigable waters leading into the Mississippi.

**The Public Trust in Navigable Waters in Wisconsin**

At the time of statehood, the State of Wisconsin received title to the navigable lakes and streams. The state's interest in the navigable waters is established and protected in the Wisconsin Constitution, art. IX, s. 1, which provides as follows:

**Jurisdiction on rivers and lakes; navigable waters. Section 1.** The state shall have concurrent jurisdiction on all rivers and lakes bordering on this

state so far as such rivers or lakes shall form a common boundary to the state and any other state or territory now or hereafter to be formed, and bounded by the same; and the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty

This provision from the Wisconsin Constitution is the foundation for most of the Wisconsin law regarding navigable waters. In Wisconsin, the navigable waters are held in trust by the state for the public. The Legislature is the trustee of the public trust in navigable waters, responsible for protecting them for the benefit of the public, and the Legislature is without power to abrogate this trust. The condition described above in s. 1.035 (2), Stats., is a good example of how the Legislature protects these rights of navigation for the citizens of Wisconsin. In fact, consent by the Wisconsin Legislature to creation of the refuge without the conditions in s. 1.035 (2), Stats., would not appear to constitute valid consent.

### **Northwest Ordinance**

Public rights in navigable waters are protected by not only the state, through its constitution and statutes, but also by federal law, through the northwest ordinance.

The historical source of Wisconsin's public trust in navigable waters is the northwest ordinance of 1787. The purpose of the northwest ordinance was to admit new states to the union on an equal footing with the original 13 states. The northwest ordinance included a provision regarding the navigable waters in art. IV, which provides in part: "...the navigable waters leading into the Mississippi and St. Lawrence and the carrying places between the same, shall be common highways and forever free, as well as to the inhabitants of the said territory, as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost, or duty therefore...." This language was adopted with only slight changes as part of the Wisconsin Constitution in 1848.

The U.S. Supreme Court has discussed the continued viability of the northwest ordinance.

To the extent that it pertained to internal affairs, the Ordinance of 1787— notwithstanding its contractual form—was no more than a regulation of territory belonging to the United States, and was superseded by the admission of the State of Illinois into the Union "on an equal footing with the original states in all respects whatever" [citing cases]. But, so far as it established public rights of highway in navigable waters capable of bearing commerce from State to State, it did not regulate internal affairs alone, and was no more capable of repeal by one of the States than any other regulation of interstate commerce enacted by the Congress; being analogous in this respect to legislation enacted under the exclusive power of Congress to regulate commerce with the Indian tribes.

The Court went on to say that this view was not inconsistent with previous decisions on the question:

Those cases simply hold, in effect, that a State formed out of a part of the Northwest Territory has the same power to regulate navigable waters within its borders that is possessed by other States of the Union; that is to say, until Congress intervenes, the power of the State, locally exerted, is plenary; nevertheless, where the navigation serves commerce among the states or with foreign nations, Congress has the supreme power when it chooses to act, and is not prevented, by anything the States may have done, from assuming entire control in the matter. [*Economy Light & Power Co. v. United States*, 256, U.S. 113, 121 (1921).]

The northwest ordinance has been incorporated into the Wisconsin Constitution, and subsequent Wisconsin common law as created by the Wisconsin Supreme Court has expanded the public trust in navigable waters to include recreational uses.

### **Federal Case Law**

It does not appear that there is a federal case that is directly on point regarding the issue of whether the U.S. Fish and Wildlife Service may restrict navigation in the refuge. However, this issue was discussed as part of a 1928 federal district court case from the Western District of Wisconsin. *United States v. 2,271.29 acres more or less, of land in La Crosse, Trempealeau, Vernon, and Grant Counties, Wis., et al.*, 31 F. 2d 617. This case was a challenge to the condemnation of land for the refuge, and did not involve condemnation or regulation of navigable waters.

However, the issue of use of the navigable waters was of sufficient importance that it was part of the challenge to the condemnation. One of the grounds for challenging the federal legislation that created the refuge was that "the state holds and controls navigable waters in trust for its people, and may not delegate such trust to another sovereignty..." (p. 620). The court disposed of this issue on the grounds that the condemnation did not involve navigable waters. However, the court acknowledged that this was a "question of unlawful abdication by the state of its obligation of people in that regard." The court further recognized that the right to regulate fish and game is a matter of state sovereignty. The court reviewed the conditions of Wisconsin's consent to creation of the refuge under s. 1.035, Stats. The court cited a number of Wisconsin Supreme Court cases that show how carefully the court has protected the right of the public to hunt and fish, and the court further noted that the Wisconsin court cases further hold that the right to hunt and fish is a part of the right of navigation. (p. 621.) Although this case did not involve directly the issue of navigable waters, the court recognized that the consent given by the state could include the provisions of Wisconsin law that create and protect the public trust in navigable waters.

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